

**MEMORANDUM**

**TO:** Superintendents and Principals

**FROM:** Indiana Department of Education

**DATE:** June 10, 2020

**RE:** Final Title IX regulations

Title IX protects every student's right to educational opportunities and benefits free from sex discrimination. The US Department of Education ("US Ed") Secretary of Education has released final regulations which will govern Title IX requirements pertaining to how schools, including K-12 schools, must respond to incidents of sexual harassment in order to prevent sex discrimination. Although, Title IX regulations have been around since the 1970s, those regulations have never specifically addressed sexual harassment/assault grievances. US Ed has previously addressed sexual harassment/assault grievances through guidance. This is the first time the matter has been addressed through regulations. The purpose of this document is to explain the new regulations that US Ed's Office of Civil Rights will use to investigate complaints against schools and to explain what requirements the regulations place on schools. The regulations will become effective on August 14, 2020.

**Title IX**

The regulations outline the following three sections:

- (1) What constitutes and is defined as sexual harassment for purposes of rising to the level of a civil rights issue under Title IX;
- (2) What triggers a school's legal obligation to respond to incidents or allegations of sexual harassment; and
- (3) How a school must respond.

**Defining Sexual Harassment – 34 CFR 106.30**

The final regulations define sexual harassment actionable under Title IX to mean any of three types of behavior:

- (1) A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called quid pro quo harassment); or
- (2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity, or

(3) Sexual assault as that crime is defined in the Clery Act and Violence Against Women Act regulations.

### **What Triggers a School's Requirement to Respond- 34 CFR 106.30**

A school's requirement to respond to sexual harassment is only triggered when certain conditions are met. Those conditions are:

- (1) School must have actual knowledge of sexual harassment or the allegations of such,
- (2) The harassment must involve conduct that occurred within the school's own program or activity, and
- (3) The harassment must have been perpetrated against a person in the United States.

#### **Actual Knowledge**

"Actual knowledge" is defined as notice of sexual harassment or allegations of sexual harassment to a recipient's title IX Coordinator or any official of the recipient who has authority to institute corrective measure on behalf of the recipient, or any employee in the elementary and secondary school context.

Schools must post Title IX coordinator contact information on their website and the school must send notice of the Title IX coordinator contact information to all parents, guardians, school unions, and employees. 34 CFR 106.44(a)

#### **School's Own Program or Activity**

The final regulations have a jurisdiction requirement. The alleged harassment must involve conduct that occurred within the school's own program or activity. Title IX, by its own text, applies to discrimination occurring "under any education program or activity" receiving federal funds.

A school's "own program or activity" means, any location, event, or circumstances where the school exercises substantial control over the context of the alleged harassment and the person accused of committing sexual harassment. An education program or activity includes any academic, extracurricular, research, or occupational training, including those on the school bus, field trips, and school conferences.

### **How a School Must Respond - 34 CFR 106.44**

Schools must respond to all reports of sexual harassment regardless of whether a formal complaint is ultimately filed. A school must also respond promptly. Schools are only obligated to respond to reports that meet the requirements laid out in the regulations: the incident meets the definition of

sexual harassment, the school has actual knowledge of the incident and the jurisdiction prong is met.

A school would only be found in violation of Title IX if its response to a report of sexual harassment is “deliberately indifferent”, defined as “clearly unreasonable in light of the known circumstances.” For example, the Title IX coordinator must respond promptly and at minimum the coordinator must reach out to the individual, inform them about available supportive measures, the right to file a complaint, and how to file a complaint. Stated otherwise, if a school was indifferent, through mere inadvertence, to a sexual assault claim, there would be no Title IX violation.

#### Required School Response After Having Actual Knowledge

- Must respond promptly and meaningfully to every report
- Must give the individual the option to file a formal complaint
- Inform the individual that supportive measures are available whether a formal complaint is filed or not
- Inform the individual accused that supportive measures are also available
- Inform all parties that an informal resolution via, for instance, mediation, may be available, as long as parties are informed of all other options and voluntarily consent to informal resolution in writing
- A formal complaint can be filed by the individual affected, or a parent/guardian or the Title IX Coordinator
  - A formal complaint can be filed via email, regular mail, or handed in person.
- Have a Title IX Coordinator on staff to intake reports and formal complaints - 34 CFR 106.8
- Activate school’s grievance process to potentially punish the perpetrator when a formal complaint is filed
- Investigate every formal complaint – 34 CFR Section 106.45(b)(3)
- Must still offer free of charge supportive measures to the individual even when no formal complaint is filed
  - Supportive measure are defined as non-punitive and non-disciplinary individualized free services such as counseling, no-contact orders, and course/academic adjustments, extension of deadlines, modifications of schedules, providing an escort, and restrictions on contact.
- The Title IX Coordinator must file a formal complaint to investigate a possible pattern of harassment of a serial/repeat offender (even if the individual[s] do not wish to file a formal complaint)

### Required Written Policies

Under the final regulations all schools are required to develop, institute, and publish their written policies on sexual harassment. The regulations are specific when it comes to the mandatory content of those written policies. It would be good practice for all schools to update or develop their policies in compliance with the final regulations as soon as possible. Below please find a summary of the required content for these written policies.

- written policies on sexual harassment must comply with the following:
  - Every school must designate one person to be the Title IX Coordinator
  - The Title IX coordinator's contact information must be posted to the school website and available for public inspection if the school does not have a website
  - Every school must distribute the Title IX coordinator's contact information to all students, parents/legal guardians, employees and unions
  - Must indicate that a report of sexual harassment can be made to the Title IX coordinator at any time
  - These policies must make clear that every school must adopt and then publish a sexual harassment grievance procedure policy, and distribute that policy to all students, parents/legal guardians, employees, and unions
  - Every school must distribute this policy on sexual harassment to all students, parents/legal guardians, employees, and unions

### Written Grievance Policy

Under the final regulations, all school are required to develop a grievance policy detailing the processes and procedures by which a school will handle a complaint of sexual harassment. The final regulations make the following content mandatory.

- Schools must have a grievance process policy to handle all formal complaints and the grievance process must have certain protections for all parties included:
  - Note: whether or not a grievance process has been initiated, the final regulations refer to victims as complainants and perpetrators as respondents
- The grievance process policy must contain the following content:
  - Cannot treat any individual differently on the basis of sex when performing an investigation or reaching a decision on a complaint
  - Must treat parties equitably, and remedies have to be designed to restore access to a school's educational program; can be punitive or disciplinary to respondent
  - Presumption of innocence
  - Objective evaluation of all relevant evidence
  - Schools must be aware of and make clear in their policies that privileges protected by a legal standard cannot be used in the investigative process unless waived by the person holding the privilege.
    - Such privileges include: attorney-client privilege and doctor-patient privilege.

- All individuals involved such as the Title IX coordinators/investigators/facilitators/decision-makers cannot have any conflict of interest or bias and all must receive specialized training. Please see section on training towards the end of this guidance document.
- The investigator of a report cannot then be the decision-maker for that case, or the informal resolution facilitator, as well as not the appeals decision-makers.
- School's must distribute training materials for Title IX coordinators/investigators/decision-makers
- Reasonably prompt timeframes for the grievance process
  - Delay can only be for good cause such as law enforcement involvement, absence of party/witness, absence of party advisor, the need to provide language assistance or to provide disability accommodations.
- Where perpetrator is found responsible, the affected individual must be given remedies designed to restore and preserve equal access to education

#### Grievance Procedure after the Filing of Formal Complaint – 34 CFR 106.45

While a school must have a grievance policy in place with certain mandatory items, below you will find a more detailed summary of how the final regulations state the grievance process should proceed. The information below can be used to develop a school's grievance procedure policy.

A school must:

- Provide written notice with sufficient details of the report to all parties indicated that an investigation has begun – 34 CFR 106.45(b)(2)
  - Details of written notice must include: actual allegation –who, date, alleged misconduct, presumption of innocence, statement that parties are entitled to advisor of their choice, statement that parties can request to inspect and review certain evidence, information regarding the code of conduct and that informal resolution is available
  - This written notice must be provided to parties before any initial interview with respondent and allow time for respondent to prepare for any interview
- Dismissals - 34 CFR 106.45(b)(3)
  - Mandatory: a school must dismiss a complaint when it does not describe conduct that meets the definition of sexual harassment; the allegations did not occur in the school's own education program or activity, or in the United States.
  - Discretionary: a school may dismiss if a complainant notifies the Title IX coordinator in writing that they wish to withdraw the complaint; if the respondent is no longer enrolled or employed by the school; if specific circumstances prevent the school from gathering evidence to reach a determination.
  - Schools must send a written notice to all parties of any dismissal, which details the party's right to appeal that dismissal decision.

- Provide all parties with a copy of the school's grievance procedures
- Proceed with a factual investigation - 34 CFR 106.45(b)(5)
  - Ensure that the burden of proof and burden to collect evidence rests on the school, not the parties
  - Provide a written investigative report to all parties
    - School needs to prepare investigative report on the allegation of the formal complaint
    - Regulations do not say how long the report must be other than that it must summarize all the evidence
    - Parties must have at least 10 days to respond in writing, if a response is submitted a school must consider it before finalizing the investigative report
    - Report must then be provided to parties
    - Report must be circulated to parties at least 10 days before any other determination of responsibility or hearing if a hearing happens
- Hearings
  - Provide equal opportunity for all parties to present evidence and witnesses
  - Inform all parties that in elementary and secondary schools, a hearing is optional
  - Not restrict the ability of any party to discuss the allegations or gather evidence
  - Provide the parties with an opportunity to be represented by an advisor of their choice (who may be an attorney)
  - Give written notice to all parties of any interview, meeting or hearing at which the parties are expected to appear
  - Create and keep records documenting every Title IX sexual harassment investigation
  - Provide equal access to all parties to review the evidence
  - Allow for cross examination to take place
  - If a hearing is not selected then the school must ensure that the parties are allowed to submit written questions to challenge each other
  - If party appears at the hearing with no advisor, then the school will provide one to the party at no cost
  - Party cannot be forced to participate in the hearing/grievance process or answer questions in cross examination
  - K-12 can hold hearing entirely virtually
  - Schools must create audio or visual recording or transcript of hearing
    - Be conscious to disability accommodations
- Determination/Decision
  - Make the determination using either the preponderance of the evidence standard or the clear and convincing standard – 34 CFR 106.45(b)(4)(i)
  - The school must decide which standard to use, and they may only choose one standard to use for all cases.
  - Schools must send written determination to parties at the same time along with appeal information

- Schools have discretion to set deadlines for when an appeal must be filed bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation within a prompt timeframe
- Title IX coordinator is responsible for carrying out the remedies contained in the written decision

Procedure after a Determination/Appeal - 34 CFR 106.45(b)(8)

After the investigation and grievance process, schools must:

- Provide a written determination to all parties explaining the outcome
- Allow all parties to appeal
  - A school has to offer an appeal to both parties
  - Appeals can occur only after two circumstances:
    - From mandatory or discretionary dismissal
    - From the end of the grievance process
  - Regulations require that schools have to allow relief to be sought under the following bases
    - A procedural irregularity affected the outcome of the matter
    - New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal
    - A conflict of interest on the part of a Title IX coordinator, an investigator who compiled evidence, or a decision-maker, and the conflict of interest affected the outcome.
  - Schools have discretion to add more bases from which parties may seek appeal
- Appeals process
  - Schools must notify all parties in writing of an appeal request
  - Parties can provide written statement in support or against appeal
  - Decision maker who decides appeal cannot be same as original decision maker, title IX coordinator, or investigator
  - After considering parties' written statement(s), the decision maker drafts written decision and sends it to parties simultaneously. This decision is final.
- Maintain all records created and allow parties to request copies of their records.
  - Duty to maintain records extends for 7 years, and includes several categories of documents:
    - Records of: investigation, appeal, informal resolution, all materials used to train title IX coordinators, investigators, decision makers, facilitators, and all the materials have to be posted on the school website or allowed for public inspection if the school has no website, and a school shall keep records of the supportive measures offered and provided in response to a report or complaint of sexual harassment

Informal Resolution - 34 CFR 106.45(b)(9)

Schools can offer informal resolution:

- Informal resolution can be offered in most cases:
  - Informal resolution is not permitted where the respondent is an employee of the school
- Can only be utilized if all parties agree to it voluntarily, school can never force it or threaten it.
- Schools cannot make any person agree to this ahead of time as a condition of employment or enrollment
- If it proceeds, school must provide facilitator who is free of bias/conflict of interest and has received special training
- School still has to provide parties with written notice, notice of rights, confidentiality, and how to withdraw from the process



## **Other Items**

### **Training**

The final regulations make it mandatory for all school employees involved in the implementation of Title IX to receive specialized training. Those individuals include: the Title IX coordinator, investigators, informal resolution facilitators, and decision-makers. These individuals must be trained on the following: definition of sexual harassment, scope of a school's own education program or activity, how to conduct an investigation and grievance procedure, including hearings, adjudications, informal resolutions, and appeals. Individuals must also be trained on how to serve impartially, without conflict of interest and bias. The regulations make clear that there must also be training on relevancy of questions and evidence and all technology used to conduct the hearing. Specifically, parties' prior sexual conduct and sexual predisposition are not relevant. Lastly, material used to train these individuals must be published on the school's website.

### **Retaliation**

No school or person is allowed to retaliate against anyone for exercising these rights under Title IX. Any person retaliated against can file a complaint with the school. The school must then have procedures in place for the prompt and equitable resolution of the complaints. Schools should keep identities of parties and witnesses confidential, unless disclosure is required under other laws or necessary to conduct the grievance process.

### **Emergency Removals**

A school can remove a respondent if they pose an immediate threat to anyone's physical health or safety. If a respondent is a school employee, the regulations do not prevent the school from placing that employee on administrative leave. Schools will, however, have to consider the collective bargaining rights of an employee in such a situation. 34 CFR 106.44(c)

### **Charter Schools**

The final regulations will apply to charter schools in Indiana. Charter schools accept federal funding and, as a result, these final regulations do apply to Charter schools.



**Dr. Jennifer McCormick**  
Superintendent of Public Instruction

DEPARTMENT OF EDUCATION

*Working Together for Student Success*

If you have any further questions regarding Title IX regulations, please reach out to the Indiana Department of Education's (IDOE) legal affairs office at [legal@doe.in.gov](mailto:legal@doe.in.gov).

Additionally, please see this webinar video that the U.S. Department of Education produced as guidance for these new regulations: <https://www.youtube.com/watch?v=TdfT5R8ibm4>

Also, please see the new regulations here, note that the regulations have not yet been added to the federal register: <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf?fbclid=IwAR22PF6GUyydOS-bpPdo8RjGYrqZxnAd6MZeXnIA8ECmPTSbGrB6m24ow>